

ENDANGERED SPECIES ACT UPDATE II

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The Fish and Wildlife Service (FWS) of the Department of the Interior and the National Marine Fisheries Service (NMFS) of the Department of Commerce (the Services) are jointly responsible under the Endangered Species Act (ESA) of 1973 (as amended) for protecting and conserving wildlife and plants from extinction. These agencies have recently modified or proposed to modify some of their policies in order to help them better fulfill their responsibilities. These recent changes are detailed in this update.

NMFS Consolidates ESA Regulations

As part of the President's Regulatory Reinvention Initiative, NMFS published a final rule consolidating and reorganizing its regulations implementing the ESA in the March 23, 1999, *Federal Register* ([64 FR 14051](#)). There have been no substantive changes to the existing regulations. However, duplicative and outdated provisions have been eliminated from the old text, and editorial changes have been made in order to clarify the regulations and make them more readable.

NMFS's regulations implementing the ESA had been codified in 50 CFR parts 217 through 227. To order the text in a more flowing, logical, and cohesive manner, it was reorganized into four parts. Revised part 222 provides general information including definitions, certificates of exemption, and permits. Revised part 223 is limited to threatened species, while revised part 224 deals solely with endangered species. Finally, revised part 226 identifies the critical habitats that have been designated by the Secretary of Commerce.

No Surprises Policy Finalized

In 1982 Congress made provision for Habitat Conservation Plans (HCPs) in order to protect species while allowing economic development. An HCP allows the Services to permit "taking" of individuals of endangered or threatened species incidental to otherwise lawful activities. The "No Surprises" policy, issued by the Services in 1994, assures holders of HCP incidental take permits that no additional land use restrictions or financial compensation will be required of them with respect to those species covered by the permit. The policy applies even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit. That policy was included in the Services joint Endangered Species Handbook for Habitat Conservation Planning and Incidental Take Permitting Process (HCP Handbook), published in November 1996.

On May 29, 1997 ([62 FR 29091](#)), the Services published a notice of proposed rulemaking (NPRM) to codify their No Surprises policy and finalized it on February 23, 1998 ([63 FR 8859](#)). The final rule modified existing regulations (50 CFR part 17 for the FWS, 50 CFR part 222 for NMFS) dealing with the HCP assurances provided through section 10(a) permits.

Many comments received on the NPRM dealt with the HCP process in general, rather than specifically with the No Surprises policy. Thus, the Services have proposed guidelines (see following discussion) to revise the HCP Handbook to both reflect the final No Surprises rule and to further enhance the effectiveness of the HCP process in general.

Guidelines for Habitat Conservation Plans Proposed

On March 9, 1999, the Services published proposed guidelines ([64 FR 11485](#)) to clarify and strengthen the use of HCPs as conservation tools under the ESA. The proposed guidelines would improve the way HCPs are developed and administered in five areas: establishment of measurable biological goals and objectives, use of adaptive management, monitoring to ensure proper compliance with an HCP, increased public participation, and determination of the duration of incidental take permits. The guidelines would become an addendum to the Services' joint HCP Handbook.

The Services are soliciting comments, recommendations, or suggestions from the public, other concerned government agencies, the scientific community, industry, or any other interested party about the draft addendum. The deadline for comments is May 8, 1999. See the *Federal Register* notice for more details and where to send comments.

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